

ARIZONA SUPREME COURT

KAREN FANN; RUSSELL “RUSTY”
BOWERS; DAVID GOWAN; VENDON
LEACH; REGINA COBB; JOHN
KAVANAGH; MONTIE LEE; STEVE
PIERCE; FRANCIS SURDAKOWSKI,
M.D.; NO on 208, an Arizona political
action committee; ARIZONA FREE
ENTERPRISE CLUB, An Arizona non-
profit corporation

Plaintiffs/Petitioner

v.

HON. JOHN HANNAH, Judge of the
Superior Court of Arizona in and for
Maricopa County, in his official
capacity,

Respondent,

and

STATE OF ARIZONA; KIMBERLY
YEE in her official capacity as
Arizona State Treasurer; ARIZONA
DEPARTMENT OF REVENUE, an
agency of the State of Arizona,

Defendants/Real Parties in Interest

and

INVEST IN EDUCATION
(SPONSORED BY
AEA AND STAND FOR CHILDREN)
a political action committee; DAVID
LUJAN.,

Intervenors/Real Parties in Interest

No. CV-22-0033

No. CV2020-015495

No. CV2020-015509
(Consolidated)

**BRIEF OF *AMICI CURIAE* GOVERNOR DOUGLAS A. DUCEY AND
THE OFFICE OF STRATEGIC PLANNING & BUDGETING**

Anni L. Foster (023643)

Jake Agron (031697)

Kyle Smith (036356)

Office of Governor Douglas A. Ducey

1700 W. Washington Street, Floor 8

Phoenix, Arizona 85007

P: (602) 542-1455

afoster@az.gov

jagron@az.gov

ksmith@az.gov

*Counsel for Amici Curie Governor Douglas A. Ducey
and the Office of Strategic Planning and Budgeting*

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Governor Douglas A. Ducey and the Governor’s Office of Strategic Planning and Budgeting (“OSPB”) (collectively, the “*Amici*”), by and through counsel undersigned, hereby submit this brief as *Amici Curiae*.¹ The purpose of this brief is to support the Petition for Special Action submitted by Plaintiffs/Petitioners in this matter due to extraordinary circumstances.

STATEMENT OF INTEREST

This brief is filed pursuant to Rule 7(f), Arizona Rules of Procedure for Special Actions which permits amicus curie to support petitions for special actions and Rule 16(b)(1)(B), Arizona Rules of Civil Appellate Procedure, which permits “the State of Arizona or an officer or agency of the State of Arizona,” to submit an *Amicus Curiae* brief to this Court.

Amicus Curiae Douglas A. Ducey is Governor of the State of Arizona. Governor Ducey appears as *amicus curiae* to explain the extraordinary circumstances of this case, the importance of finality to this case for taxpayers and the urgent need for definitive guidance on the constitutionality of the initiative titled “Invest in Education Act” (“Prop. 208”) bearing the initiative serial number I-31-2020 and codified at A.R.S. §§15-1281 through 1285 and 43-1013.

¹ This brief is authorized by Ariz. R. Civ. App. P. 16(b)(1)(B). No persons or entities other than the Office of the Governor have provided financial resources for the preparation of this brief.

Amicus Curiae OSPB is a division of the Arizona Governor's Office. One of OSPB's primary responsibilities is providing the executive's state budget recommendation to the Arizona Legislature. OSPB's executive budget recommendation is based on financial data provided by state agencies and prior to making its recommendation, OSPB consults with all state agencies and applicable law for a comprehensive view of the budgetary needs of the state. Throughout the fiscal year, OSPB monitors and assesses the financial condition of the state through information from state agencies, the General Fund and other public finance metrics relating to the operation of state government. This continual monitoring and assessment generally allows for OSPB to provide a thorough recommendation to the executive, not just for the initial budget recommendation, but also for real-time modifications through the legislative process as necessary. With the need to enact an annual budget that must go into effect on July 1, delay in information and inputs necessary to finalize the annual budget between the Legislature and the Governor creates a great deal of uncertainty for the upcoming fiscal year. Pursuant to law, OSPB issued its budget recommendation for Fiscal Year ("FY") 2023 on January 14, 2022. *See* Ariz. Rev. Stat. § 35-111.

As a public officer duly elected to the executive branch whose duty is to execute the laws of the state, including the implementation of the budget appropriated by the legislature, Governor Ducey, along with OSPB, respectfully

submits this brief to encourage this Court to exercise its discretion to immediately accept the Petition for Special action, expedite briefing and issue a decision on the matter. *Amici* are uniquely positioned to understand and articulate the gamut of complications and uncertainties that a continued delay in this litigation and finality on the questions surrounding Prop. 208 will continue to inject into the current budget process and to taxpayers. Further, *Amici* strongly believe that it is not only appropriate, but of imminent necessity for this Court to expeditiously resolve with finality the continuing constitutional questions presented in this case in order to provide not only guidance, but finality to the state of Arizona as soon as possible due to upcoming statutory deadlines that are impacted by this case, including the need to implement a budget by July 1.

SPECIAL ACTION JURISDICTION

Special actions provide an avenue for relief when there are no other remedies provided under law. Ariz. R.P. Spec. Act. 1. Special action jurisdiction has been found to be appropriate when the case presents issues of first impression, the issue is one of statewide importance and is likely to arise again. *Prosis v. Kottke*, 249 Ariz. 75, 77 (App. 2020).

Rule 3 of the Rules of Procedure for Special Actions provides that three questions may be raised in a special action, which include:

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion;
or
- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Ariz. R.P. Spec. Act. 3. As outlined in this brief and pursuant to previous determinations made by this Court, this case presents issues of statewide importance that have resulted in an abuse of discretion that must be resolved by this Court. There can be no question that the issue of one superior court judge impacting the operations of two, separate, equal branches of government and taxpayers provides adequate justification of statewide importance for this Court to act.

STATEMENT OF ISSUES

1. Whether the stipulation of the parties filed in the trial court stating that Prop. 208 will more likely than not result in an accumulation of funds that cannot be spent, make the remand to the superior court moot.

2. Whether based on the stipulation between the parties this Court can declare Prop. 208 unconstitutional and issue a permanent injunction to enjoin its implementation and enforcement.

STATEMENT OF FACTS

The Court is no stranger to the facts of this case and for those reasons, the *Amici* will not waste the Court's time restating all of the facts that resulted in this case being presented to it yet a third time. Prop. 208 was filed two years ago in February, 2020. *Fann v. State*, 251 Ariz. 425, 493 P.3d 246, 256 (2021). Prior to its certification, a challenge was filed and decided by this court over the 100-word description and petition circulator concerns. *Molera v. Hobbs*, 250 Ariz. 13, 474 P.3d 667 (2020). In *Molera*, this Court stated, "Whether § 15-1284(E) unconstitutionally curtails legislative authority, as the superior court implies, cannot be decided until after its adoption." *Id.* at 677.

Following adoption, an action was filed in Maricopa County Superior Court, CV2020-015495² challenging Prop. 208's constitutionality on several different theories. *Fann v. State*, 251 Ariz. 425 (2021). The trial court denied the request for injunction and that ruling was appealed and transferred to this Court. *Id.* Six months ago, this Court issued its opinion which stated both that Prop. 208 was "facially

² This case was consolidated with CV2020-015509.

unconstitutional” in part and that as to the application of the law the Court did not have enough information to determine whether the Prop. 208 monies would result in an exceedance of the aggregate expenditure limit. *Id.* For this reason, this Court remanded the case to the trial court for fact finding on a very narrow question. *Id.*

The limited question presented to the trial court was whether funds generated from Prop. 208, would exceed the aggregate expenditure limit that limits the amount of state funds that can be allocated to education. *Id.* After receiving the case on remand, the Superior court was made aware on September 23, 2021, of the important timelines affecting taxpayers. (Pet. App 1, pp. 27). For six months, with full knowledge of the gravity of the issues in this case and the timelines that were necessary to provide clarity to taxpayers, this case has remained in the trial court even as the parties to the matter have attempted to narrow the issues. In order to obtain quick resolution, the parties ultimately stipulated to specific facts of the case. (Pet., page 4 ¶ 2). Thus, with the case at issue, just this week, the trial court indicated that it could take the entire 60 days provided under the Constitution and might even decide, before the expiration of that 60 days, that an evidentiary hearing was necessary, thereby resetting the 60-day clock.

ARGUMENT

A. Special Action Jurisdiction

Special action jurisdiction was designed with the expeditious resolution of cases in mind. It is available where there is no “equally plain, speedy, and adequate remedy by appeal.” Ariz. R.P. Spec. Act. 1(a). It is proper in extraordinary circumstances, including when a case “involves a dispute at the highest levels of state government.” *Rios v. Symington*, 172 Ariz. 3, 5 (1992). When a case “requires a swift determination because it concerns the state budget for the current fiscal year,” this Court has held that special action jurisdiction exists. *League of Arizona Cities and Towns v. Martin*, 219 Ariz. 556, 558 (2009).

Further, in *Brewer v. Burns*, this Court decided that special action jurisdiction was proper in a budget dispute. In that case, the Court determined that because the facts were undisputed, and “[i]n light of the parties involved, the issue, and the time of this dispute in relation to the enactment of a budget” special action jurisdiction was proper. *Brewer v. Burns*, 222 Ariz. 234, 237 (2009).

Here, this case yet again presents matters of statewide importance. Issues which have become more urgent than the last time that this Court reviewed the facts of the case, now have a definite impact on taxpayers, who, based on the Superior Court’s delay, will now be required to pay a tax that the Court has ruled unconstitutional.

Further, this case is a dispute at the highest levels of state government. As outlined in the Petition, state budget negotiations are difficult to conduct due to the uncertainty caused by this case. Based on this Court's prior decision that Prop. 208 is unconstitutional on its face, OSPB, left with no other choice, has taken the position that revenues derived from the proposition should not be included in the state budget proposal. However, should the trial court and an ultimate appeal determine otherwise, major shifts in the budget proposal would be necessary. The issues presented by this case must have prompt and final resolution.

B. Further delay.

As outlined in the Petition, although almost 30 days has passed since the case was submitted, the superior court has stated that it could still schedule an evidentiary hearing before ruling, knowing that such action would restart the clock for the 60-day constitutional deadline. Such statements cannot be supported by Art. VI, § 21 of the Arizona Constitution. As a separate but equal branch of state government, the Supreme Court is granted broad authority to implement rules that govern the functioning of the courts in this state. *See* Ariz. Const. Art. VI §5(5) (power to make rules relative to all procedural matters in any court). While checks and balances are provided to the separate and distinct branches of government, each branch must also do its duty to uphold the duties of its own actors under the Constitution. In this case, it is incumbent on the judiciary to ensure that one judge does not have the authority

to stall government operations for the other two branches. The 60-day limit is applicable to all cases, both those that are extremely complex and those that are much simpler. The 60-day limit is intended as a ceiling though, not a grant of authority to delay proceedings unnecessarily. Although in complex cases, 60 days may be a reasonable amount of time for a case to be decided, in others where the issues are much simpler – like this one – use of the full 60 days is a delay of justice. The Supreme Court under Art. VI, §§ 5 and 21 clearly is granted the authority to regulate timelines for the superior court and doing so is necessary in this case. This Court presented a very specific question on remand, the parties have stipulated to the facts and waiting 60 days for a ruling is becoming more and more unreasonable every day. For these reasons alone, the Court should accept this case.

C. This Case Presents Extraordinary Circumstances Concerning the State of Arizona Budget and Requiring the Interpretation of the Arizona Constitution and Statutes

Extraordinary circumstances further justify special action relief. This Court has already determined that this case presents extraordinary circumstances when it accepted transfer of the appeal. It has already determined that Prop. 208, a statewide law enacted by a ballot initiative, violates Ariz. Const. art. IX, § 21, Ariz. Const. art. IX, § 22, the Revenue Source Rule under art. IX, § 23 of the Ariz. Const. and Ariz. Const. art. IV. Yet, the state is still left in a lurch as to the final disposition of this case.

Over a year ago this month, the trial court's Preliminary Injunction Ruling minimized Prop. 208's real impact by announcing there will be "plenty of time, before the tax takes effect, to litigate this case to final judgment" and that "if it turns out that the taxpayers have overpaid, they will have a simple, straightforward remedy: a tax refund." *Fann v. State*, Maricopa Co. No. 2020-015495, at *7 (Feb. 5, 2021). Unfortunately, time has now run out. The tax has now taken effect and taxpayers are required, absent action from this Court, to pay that tax. Without action in this case, the superior court's flawed reasoning has the result of depriving taxpayers of those funds while the state holds onto them indefinitely. Such reasoning is beyond belief especially in light of Art. II, § 2 of the Arizona Constitution.

While the litigation continues and in light of the uncertainty that results, leaders in the other two branches of government have been required to push forward, including the executive's submission of yet another budget recommendation while looming questions still exist on the constitutionality of Prop. 208. Due to this Court's opinion in the predecessor case, *Fann v. State*, which stated that a portion of Prop. 208 was "facially unconstitutional," its opinion that those funds generated from Prop. 208 in excess of the aggregate expenditure limit were unconstitutional and projections that education expenditures in FY2023 will exceed the aggregate expenditure limit, OSPB did not include funds attributed to Prop. 208 in the budget recommendation for FY 2023. *Fann v. State*, 251 Ariz. 425, 493 P.3d 246, 256

(2021). Thus, should this case not get resolved before the adoption of the FY2023 state budget, the uncertainty that this case has presented over its duration will continue indefinitely.

Additionally, the looming March 1 deadline for the legislature to make a decision to override the aggregate expenditure limit for FY2022, while Intervenor's argue that there is uncertainty about future aggregate expenditure caps, significantly impacts the crafting of subsequent state budgets. The superior court's refusal to resolve the matter before it unreasonably clouds the irreversible impact of waiving the aggregate expenditure limit is unconscionable. For this reason, special action relief is warranted.

Ultimately, the public financial consequences of Prop. 208 are measurable, substantial and of statewide importance. This Court repeatedly has held that legislative budgeting concerns needing prompt resolution are issues of statewide importance and are proper subjects for special action jurisdiction. *Hull*, 192 Ariz. at 36, ¶ 7, 960 P.2d at 636; *State Comp. Fund v. Symington*, 174 Ariz. 188, 192, 848 P.2d 273, 277 (1993). Thus, the State, generally, and the *Amici*, specifically, urgently need this Court to expeditiously decide the issues in this case and provide final guidance for use in budgeting for this, and subsequent, fiscal years. This Court has already determined that the issues presented in this case were of such importance to

support a transfer. Now even more than before, the issues in this case justify special action relief and must be resolved to finality.

CONCLUSION

Based on the foregoing, *Amici* respectfully request that this Court exercise its discretion to accept special action jurisdiction over this matter.

RESPECTFULLY SUBMITTED this 10th day of February, 2022.

**Office of Governor
Douglas A. Ducey**

/s/ Anni L. Foster

Anni L. Foster (023643)

Jake Agron (031697)

Kyle Smith (036356)

1700 W. Washington Street, Floor 8

Phoenix, Arizona 85007

Attorneys for Amici

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, I electronically filed the Brief of *Amici Curie* Governor Douglas A. Ducey and the Office of Strategic Planning and Budgeting, with the Arizona Supreme Court through the Court's AZ TurboCourt e-filing system.

I further certify that copies of the foregoing were e-served the same day via AZ Turbo Court to:

Dominic E. Draye (#033012)
GREENBERG TRAURIG, LLP
2375 East Camelback Road
Phoenix, Arizona 85016
Telephone: (602) 445-8000
drayed@gtlaw.com

Brett W. Johnson (#021527)
Colin P. Ahler (#023879)
Tracy A. Olson (#034616)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
bwjohnson@swlaw.com
cahler@swlaw.com
tolson@swlaw.com

Timothy Sandefur (#033670)
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
Telephone: 602.462.5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiffs-Appellants

Brian Bergin
Kevin Kasarjian
Bergin, Frakes, Smalley & Oberholtzer
4343 East Camelback Road, Suite 210
Phoenix, AZ 85018
bbergin@bfsolaw.com
kkasarjian@bfsolaw.com

*Attorneys to Defendants-Real Parties in Interest State of Arizona and Arizona
Department of Revenue*

Steve Tully
Tully Bailey LLP
4533 E. Desert Cove Avenue
Phoenix, AZ 85028
stully@tullybailey.com

*Attorneys to Defendant-Real Party in Interest Kimberly Yee, in her official
capacity as Arizona State Treasurer*

Roopali H. Desai
D. Andrew Gaona
Kristen Yost
Coppersmith Brockelman PLC
2800 North Central Avenue, Suite 1900
Phoenix, AZ 85004
rdesai@cblawyers.com
agaona@cblawyers.com
kyost@cblawyers.com
Daniel J. Adelman
Arizona Center for Law in the Public Interest
352 East Camelback Road, Suite 200
Phoenix, AZ 85012
danny@aclpi.org

*Attorneys for Intervenor-Defendants-Real Parties in Interest Invest in Education
(Sponsored by AEA and Stand for Children) and David Lujan*

Logan Elia
John Sud
Audra Petrolle
Thomas Galvin
Rose Law Group PC
7144 E. Stetson Drive, Suite 300
Scottsdale, AZ 85251
lelia@roselawgroup.com
jsud@roselawgroup.com
apetrolle@roselawgroup.com
tgaltin@roselawgroup.com

Attorneys for Plaintiffs Eco-Chic Consignment, Inc., Ann Siner, and John Buttrick

I further certify that a copy was hand-delivered the same day to:

The Honorable John Hannah
Maricopa County Superior Court
East Court Building
Room 811
101 W. Jefferson Street
Phoenix, AZ 85003

By: /s/ Anni L. Foster

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of *Amici Curie* complies with Rule 16 of the Arizona Rules of Civil Appellate Procedure. The Brief is double-spaced, utilizes a proportionally spaced typeface of 14 points, and contains 2,603 words utilizing the word count of the word processing system used to prepare the Brief.

By: /s/ Anni L. Foster